



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 177 OF 2017

(Formerly Machakos ELC No. 32 of 2012)

JULIUS NYARIBARI.....PLAINTIFF

VERSUS

ANN AFANDI.....1ST DEFENDANT

REGISTRAR OF LAND NGONG LAND REGISTRY.....2ND DEFENDANT

JUDGEMENT

By a Plaint dated the 6th February, 2012, the Plaintiff seeks judgement against the Defendant in the following terms:

- a. Cancellation of title deed for land reference No. NGONG/ NGONG/ 15742 in the name of ANN AFANDI and immediate rectification to read the JOINT names of the Plaintiff JULIUS NYARIBARI ARISI and the Defendant ANN AFANDI.
- b. The 2nd Defendant be ordered to rectify the register to indicate that the property is jointly owned by the Plaintiff and the 1st Defendant herein.
- c. Cost of the suit and interest at the Court rates.
- d. Any relief that this Honourable Court may deem fit and/or just to grant

The 1st Defendant filed a Defence and Counterclaim dated the 16th April, 2012 where she denied the Plaintiff's averments and sought the following prayers:

- a. A declaration that she was the rightful legal owner of the land parcel number NGONG/ NGONG/ 15742 to the exclusion of the Plaintiff.
- b. A permanent order of injunction to restrain the Plaintiff whether by himself, his agents and/or servants from interfering with her use and/or occupation of the suit land.
- c. An order of eviction to evict the Plaintiff from the suit land.
- d. Costs and interest
- e. Any other relief which the Honourable Court may deem appropriate in the circumstances

The 2nd Defendant did not enter appearance nor file a Defence despite being duly served.

Evidence of the Plaintiff

PW1 JULIUS NYARIBARI adopted his witness statement dated the 23rd May, 2012 as evidence in court and produced his documents filed on 23rd May, 2012 as Plaintiff's exhibits. He stated that upto 2010 the 1st Defendant was his wife as they had been married for 15 years. He testified that together with the 1st Defendant, they purchased land parcel number NGONG/ NGONG/ 15742, hereinafter referred to as the suit land' and jointly executed a Sale Agreement to that effect and he paid more than Kshs. 100,000 towards the purchase price. He stated

that in 2009 when they almost completed the Sale, the 1st Defendant wanted to be solely registered as the proprietor of the suit land and this led him to registered a caution on it. But later when he undertook a Search at the Land Registry, he discovered the title deed was registered in the 1st Defendant's name. He confirmed that they only had one lawyer who represented them in the transaction.

During cross examination he stated they entered into an agreement where both himself and 1st Defendant were purchasers. He confirmed that Kshs. 460, 000/= towards the purchase price came from Kenversity SACCO where the 1st Defendant is a member. Further, he claims to have assisted her clear the loan from Kenversity SACCO as he was not a member therein nor a guarantor. He stated that he used to give her money but does not have any evidence to prove it. He averred that the 1st Defendant did not pay for the whole land and that he paid Kshs. 10,000 to the account of Joan Kangethe who is the deceased Vendor's daughter. He further confirmed that all the documents which he produced as exhibits relate to school fees for their children, which he paid, but the 1st Defendant failed to pay. Further, that he was under an obligation to pay the said school fees, and they shared responsibilities with the 1st Defendant. He further stated that he had a new wife but he allowed the 1st Defendant to reside on the suit land, which they both have rights to. He said the 1st Defendant was no longer his wife but mother to his children. Further, that the divorce cause between him and the 1st Defendant is pending determination. He reiterates that the suit land is matrimonial property.

In re-examination he insisted no one sought his consent to register the suit land in the 1st Defendant's name and that he is an owner of the suit land because of his contribution towards its purchase. He reiterated that he deposited money into an account toward the purchase price. He sought for the Court to grant him the prayers stated in the Plaintiff.

The Plaintiff thereafter closed his case.

Evidence of the 1st Defendant

DW1 ANN AFANDI adopted her witness statement as evidence in court and produced her documents as 1st Defendant's exhibits. She confirmed having been married to the Plaintiff for 15 years and during that time, they entered into an agreement to purchase a plot. The purchase price was Kshs. 700,000 and they jointly signed the Sale Agreement as purchasers but she is the one who paid for it, and has receipts including her bank statements to confirm it. She states that they were both to contribute towards the purchase price and it did not happen. She explained that there was a Cheque of Kshs. 100,000 that the Plaintiff has presented as his evidence of contribution; she stated that they jointly signed the cheque as they were using a family business account, and took cheque to lawyer. Further, that after their divorce, the Plaintiff advised the lawyer not to cash it, and that is the reason the said cheque was never cashed. She testified that she moved out of the matrimonial home, as the Plaintiff was not interested in the suit land and later paid the balance of Kshs. 90,000, which culminated in the said suit land being transferred to her name. She insists she was catering for her fare to work and it was the Plaintiff's responsibility to take care of family expenses as he was using the car she bought, for car hire business; and she was supporting him to be economically stable. Further, that, he disappeared with the car and a Milimani Court ordered him to pay for the maintenance of children but he declined as well as disappeared and there is a warrant of arrest against him. She contended that the suit land is hers since the vendor George Wambugu transferred the same to her and that is where she resides with her children. Further, that the Plaintiff comes on and off and this interferes with their peaceful co- existence thereon. She sought to be granted the orders in the Counterclaim.

During cross examination she confirmed clearing the balance of the purchase price on 19th January, 2011 and she had no idea that the Plaintiff paid Kshs. 10,000 as the lawyer did not inform her. Further that as per the agreement, both of them were to contribute towards the purchase price as the Plaintiff was running a business at the time the suit land was being purchased. She contended that she bought a car for the Plaintiff to run the business as he was not employed anywhere but depended on the said business. She reiterated that the Plaintiff was able to pay for the purchase price but he mismanaged the business and that George Wambugu transferred the land to her. Further, that Kangethe Advocate provided the documents and she used an agent to process the transfer, as there was no issue of consent because she had a letter from Laibuta Advocate compelling them to transfer the suit land to her.

The 1st Defendant thereafter closed her case.

Both the Plaintiff and 1st Defendant filed their written submissions.

The Plaintiff relied on section 6(1) of the Matrimonial Property Act which defines matrimonial Property as follows: '**(a) the matrimonial home or homes; (b) household goods and effects in the matrimonial home or homes; or (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.**' He submitted that the suit land was indeed matrimonial property as it was acquired during the subsistence of their marriage. The Plaintiff further relied on section 2 of the Matrimonial Property Act which defines contribution as follows: '**contribution means monetary and non – monetary contribution and included – (a) domestic work and management of the matrimonial home; (b) child care; (c) companionship; (d) management of family business or property; and (e) farmwork.**' He submitted that he contributed Kshs. 10,000 through his cooperative bank account and also did a bankers cheque of Kshs. 50,000. He states that he further contributed in paying the children's school fees as depicted from the receipts he furnished court as exhibits. Further, that he contributed towards the day to day running of the house. He relied on the judicial authority of PNN V ZWN (2017) eKLR where Justice Kiage averred at paragraph 5 of his judgement as follows: ' **a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in LOCK YENG FUN v CHUA HOCK CHYE (2007) SGCA 33;**

It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and its very nature cannot be precise mathematical exercise.'

In his submissions, the Plaintiff referred to Article 45(3) of the Constitution, which provides for equal rights at the commencement, during and after the dissolution of the marriage. He submitted that the 1st Defendant acted in bad faith as they understood the financial capability of each spouse and she still proceeded to be solely registered as the proprietor of the suit land. He also relied on the Land Act and averred that it

is now mandatory to obtain spousal consent before transferring land.

The 1st Defendant filed her submissions where she reiterated her Defence and stated that it is the vendor who transferred the suit land to her, and yet the said Vendor was not enjoined in the suit as a Defendant and it thus follows that the claim of fraud against the 1st Defendant must fail. Further, the Plaintiff has not brought forth any evidence to support the allegation of fraud. The 1st Defendant submitted that the matter before court is not a matrimonial cause which falls squarely on the High Court whilst the instant court is an Environment and Land Court whose mandate is limited towards determining of a right over land acquisition and not matrimonial property.

She contended that she is the registered proprietor of the suit land and thus her interest is covered by section 24, 25 and 26 of the Land Registration Act. Further, that an order of rectification sought by the Plaintiff is available under section 80 (1) & (2) of the Land Registration Act which provides that the Court may order rectification of register by cancellation or amendment if satisfied that any registration was obtained or omitted by fraud or mistake, which have not been proved in this instance. She confirms she is in possession of the suit land which she acquired for valuable consideration by paying the full purchase price as evident in the documents presented, and she resides thereon with her children. She submitted that she is not guilty of omission, fraud or substantially contributed to it by any act or neglect. She insisted the Plaintiff did not prove co – ownership as provided for under section 93(2) of the Land Registration Act by either proving contribution by his labour, upkeep as well as improvement of the land.

She reiterated that the Plaintiff has failed to prove his case on a balance of probability, while the 1st Defendant has proved her Counterclaim on a balance of probability and she urged the court to dismiss the suit with costs.

Analysis and determination

Upon perusal of the pleadings filed herein including the written submissions and the exhibits, the following are the issues for determination:

- Whether the Plaintiff contributed towards the acquisition of land parcel number NGONG/ NGONG/ 15742.
- Whether the 1st Defendant was fraudulently registered as the proprietor of land parcel number NGONG/ NGONG/ 15742
- Whether the 1st Defendant is the rightful owner of land parcel number NGONG/ NGONG/ 15742.
- Whether land parcel number NGONG/ NGONG/ 15742 should be deemed as matrimonial property.
- Whether the Plaintiff is entitled to the Orders sought.
- Whether the 1st Defendant is entitled to the Orders sought.
- Who should bear the costs of suit?

It is not in dispute that the Plaintiff and the 1st Defendant were husband and wife for 15 years at the time of acquisition of the suit land. It is further not in dispute that the 1st Defendant is already registered as proprietor of the suit land. What is in dispute is the Plaintiff's contention that he contributed towards the acquisition of the suit land but the 1st Defendant fraudulently got registered solely as its owner. From the evidence presented in court, PW1 testified that he paid over Kshs. 100,000 as his contribution towards the purchase price but was also catered for the children's education as well as household expenses. However, upon cross-examination he admitted only paying Kshs. 10,000 towards the purchase price by depositing the same into the vendor's daughter's account which DW1 disputed. It was DW1's evidence that they were supposed to contribute equally towards the acquisition of the suit land but upon jointly executing the Sale Agreement with the Plaintiff, he reneged on this arrangement compelling her to pay the whole of the purchase price and that is the reason she was registered as its sole proprietor. PW1 admitted that most of the purchase price was paid by Kenversity Sacco where the DW1 was a member but he was not able to take a loan as he was unemployed but running a small business. DW1 insisted that PW1 was able to contribute towards the acquisition of the suit land as he was getting proceeds from the family business which she had set up for him, but he refused. Further it was DW1's evidence that they signed a joint cheque of Kshs. 100,000 towards the purchase price, which monies were to be drawn from the family business account in Cooperative Bank but PW1 later instructed the lawyer not to cash the said cheque, culminating in her settling the balance of the purchase price. DW1 stated that it was as a result of the foregoing that she requested the lawyer to register her as the owner of the suit land since she paid the full purchase price, and that she resides thereon with their children. PW1 admitted they are divorced and he has since remarried but he has a right to come to the suit land since he contributed towards its acquisition and it is matrimonial property, which he is entitled to an agreed share of. DW1 reiterated that it was the vendor GEORGE WAMBUGU (deceased) who transferred the suit land to her after she had finished paying the purchase price to the lawyer.

I note PW1 and DW1 already had a separation and maintenance Cause No. 30 of 2012 in Court. I note some of the exhibits produced by PW1 to support his claim included Sale Agreement; copy of title deed in the vendor's name; Kenya Power & Lighting Ltd Supply Contract; Certificate of Official Search to show Caution he has registered on the suit land; Affidavit of Marriage; ruling from the Separation and Maintenance Cause and an Equity Banker's Cheque for Kshs. 50,000; School fees receipts from Werus Academy & Chogoria Girls and a Deposit slip for Kshs. 10,000 to Cooperative Bank Kenya Limited to Werus Academy. I opine that these exhibits are very appropriate in a cause for division of matrimonial property and not in the instant cause. From all the Plaintiff's exhibits, there is none to indicate he paid any purchase price to the vendor GEORGE WAMBUGU.

I note the Plaintiff seeks a prayer for rectification of title so that the title deed can include his name since it is matrimonial property.

Section 93 of the Land Registration Act provides as follows:

‘Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.’

From these legal provisions, I find that the Plaintiff's claim can only be determined in the High Court and not the ELC Court as it does not have jurisdiction to deal with issues of division of matrimonial property.

Section 79(1)(a) (2) of the Land Registration Act provides as follows: **' (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—**

(a) in formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor;

(2) No alteration affecting the title of the proprietor may be made pursuant to sub-section (1) without the proprietor's consent unless—

(a) the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or

80. Rectification by order of Court

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'

80 (2) (2) No indemnity shall be payable under this Act to any person who has caused or substantially contributed to the damage by fraud or negligence, or who derives title, otherwise than under a registered disposition made bona fide for valuable consideration, from a person who caused or substantially contributed to the damage.'

The Plaintiff contends that the suit land is matrimonial property and although he did not contribute towards its acquisition, his name should be included in the title deed. He hence seeks orders for rectification of the title to include his name.

The 1st Defendant insists she solely paid the purchase price and is hence the registered proprietor. The burden of proof was on the Plaintiff to prove he contributed towards the purchase price to enable his name be included in the suit land. Section 107 of the Law of Evidence Act provides that:

'(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'

However, in relying on the provision of Section 107 of the Evidence Act, I find that the plaintiff has failed to adduce evidence on his contribution towards the payment of the purchase price amounting to Kshs. 700,000. In so far as the suit land was acquired during the subsistence of the marriage between the Plaintiff and the 1st Defendant, I find that the Plaintiff's claim to be included as the registered proprietor of the suit land as it forms part of matrimonial property lies in the High Court and not at the Environment & Land Court whose jurisdiction is clearly stipulated within the Environment & Land Court Act and is not given the mandate to determine issues relating to matrimonial property.

As to whether the 1st Defendant was fraudulently registered as the proprietor of the suit land, from the evidence presented, I note he did not include the Vendor as part of the proceedings, I find that the 1st Defendant solely paid for the suit land which led to the vendor transferring the same to her. At this juncture, I hold that there was no element of fraud in the land being transferred to the 1st defendant since the Plaintiff had not contributed towards its acquisition as had been agreed. His argument that he contributed to the maintenance of the family, entitled him to be registered as proprietor of the suit land, is a good argument in a cause for division of matrimonial property and not for joint ownership as envisaged in the Land Registration Act.

On the case of cancellation of title held by the 1st defendant, Section 26 of the Land Registration Act provides as follows:

'(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'

I find that since the plaintiff did not prove that the Certificate of title issued to the 1st Defendant was obtained fraudulently, I hold that the said title is indeed prima facie evidence that she owns the suit land.

As to the whether the 2nd Defendant's would be compelled to recall title and cancel the same and rectify the register, I note that he is only mandated to do so under section 79 (1) and (2) of the Land Registration Act which provides as follows;

'(1) The Registrar may rectify the register or any instrument presented for registration in the following cases—

(a) in formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor;

(b) in any case and at any time with the consent of all affected parties; or

(c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel;

(d) for purposes of updating the register;

(e) for purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.

(2) No alteration affecting the title of the proprietor may be made pursuant to sub-section (1) without the proprietor's consent unless—

(a) the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or

(b) it would for any other reason be unjust for the alteration not to be made, Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.'

However the Plaintiff did not present any evidence in court to prove he had furnished the Land Registrar with sufficient information to enable him do so. In the circumstances I hold that the Land Registrar registered the 1st Defendant as proprietor of the suit land based on documents availed to him and will exonerate him from the Plaintiff's claim herein.

It is against the foregoing that I find that the Plaintiff has not proved his case on a balance of probability and will proceed to dismiss it with costs to the 1st Defendant. I will not award costs to the 2nd Defendant since he did not enter any appearance. I further enter Judgement for the 1st Defendant in terms of the counterclaim as follows:

a. The 1st Defendant be and is hereby declared as the legal owner of the land parcel number NGONG/ NGONG/ 15742.

b. The Plaintiff be and is hereby permanently restrained from whether by himself, his agents and/or servants from interfering with the 1st Defendant's use and/or occupation of the suit land.

c. Each party to bear their own costs

Since I do not have jurisdiction to determine the issue of division of matrimonial property, I will decline to grant eviction orders against the Plaintiff as this can only be granted by a Court competent to make orders on division of matrimonial property.

I so order.

Dated signed and delivered in open court at Kajado this 25th day of June, 2018.

CHRISTINE OCHIENG

JUDGE